In The

Supreme Court of the United States

October Term, 1977

No. 77-1618

SIMON L. LEIS, JR., HONORABLE WILLIAM J. MORRISSEY, HONORABLE ROBERT S. KRAFT, AND THE HAMILTON COUNTY COURT OF COMMON PLEAS,

Petitioners,

vs.

LARRY FLYNT, HUSTLER MAGAZINE, INC., HERALD PRICE FAHRINGER, AND PAUL J. CAMBRIA, JR.,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Herald Price Fahringer, Esq.
Paul J. Cambria, Jr., Esq.
Attorneys for Respondents
Barbara J. Davies, Esq.
On the Brief
One Niagara Square
Buffalo, New York 14202
(716) 849-1333

Lipsitz, Green, Fahringer,
Roll, Schuller & James
Of Counsel

Daily Record Corporation
Rochester, New York

(3842)

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Respondents LARRY FLYNT, HUSTLER MAGAZINE, INC., HERALD PRICE FAHRINGER, and PAUL J. CAMBRIA, JR., pray that a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit entered on April 12, 1978 be denied.

Opinion Below

The opinion of the Court of Appeals dated April 12, 1978 is printed in the Appendix to the Petition at p. 1a, *et seq.*

Jurisdiction

Following a hearing held on June 29, 1977 before the Honorable Carl B. Rubin in the United States District Court for the Southern District of Ohio, it was ordered that an injunction issue against the Judges of the Court of Common Pleas of Hamilton County, Ohio (petitioners Honorable William J. Morrissey and Honorable Robert S. Kraft) until respondents Herald Price Fahringer and Paul J. Cambria, Jr. are granted an appropriate hearing on the question of their admission *pro hac vice* to represent respondents Larry Flynt and Hustler Magazine, Inc. in the Court of Common Pleas on criminal charges.

Petitioners appealed to the United States Court of Appeals for the Sixth Circuit. On April 12, 1978 that Court affirmed the decision of the District Court. A petition for a writ of certiorari was served upon respondents on May 12, 1978. The jurisdiction of this Court was invoked under 28 U.S.C. § 1254(1). This brief in opposition to the petition is filed within thirty days after receipt of the petition, pursuant to Rule 24 (a) of the Supreme Court Rules.

Constitutional Provisions Involved

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statutes Involved

42 U.S.C. § 1983

Civil Action of Deprivation of Rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress.

Questions Presented

1. Whether the removal of respondents Fahringer and Cambria (who were admitted *pro hac vice* in the Court of Common Pleas, Hamilton County) as counsel of record without a hearing was a denial of procedural due process, as found by the federal district court and as affirmed by the United States Court of Appeals.

2. Whether the federal district court properly enjoined the state criminal prosecution until such time as respondents Fahringer and Cambria are granted a hearing on their revocation from *pro hac vice* status because the abstention doctrine is in no way applicable to the situation at bar as held by the United States Court of Appeals.

Statement of Facts

On February 8, 1977, respondents Flynt (the publisher of Hustler Magazine) and Hustler Magazine, Inc. (a corporation duly organized and existing under and by virtue of the laws of the State of Ohio), were indicted on a 12-count indictment charging them with disseminating material harmful to juveniles in violation of sections of the Ohio Revised Code. On that same day they appeared before a judge of the Hamilton County Court of Common Pleas for the purpose of fixing bond. Pursuant to the Ohio court's directive, local Ohio counsel, who had been appearing of counsel to respondents Fahringer and Cambria in an ongoing Ohio prosecution involving the same criminal defendants, appeared and put on the record respondents Fahringer's and Cambria's names as counsel of record for respondents Flynt and Hustler Magazine, Inc.

The arraignment judge, who was the only judge hearing the case at that time, was presented with a form requesting an order designating counsel of record which he duly signed and which was filed with the clerk of Common Pleas, Criminal Division,

Hamilton County, Ohio on February 22, 1977. The same was entered of record on February 23, 1977. After the designation of respondents Fahringer and Cambria as counsel of record, the case was assigned to petitioner Morrissey by court officials in light of his involvement with previous pending cases concerning the same respondents.

In the latter part of February, 1977 respondents Fahringer and Cambria prepared and filed numerous pre-trial motions, including a bill of particulars and discovery as well as a motion seeking to remand the case from the Common Pleas Court to the Municipal Court. On April 8, 1977 all parties appeared before petitioner Morrissey for the argument of the pre-trial motions. At that time petitioner Morrissey informed respondents Fahringer and Cambria that they were not, in direct contradiction of the docketed order of the arraignment judge, attorneys of record and would not be permitted to appear for respondents Flynt and Hustler Magazine, Inc.

Petitioner Morrissey offered no reason for summarily prohibiting respondents Fahringer's and Cambria's representation of respondents Flynt and Hustler Magazine, Inc. No hearing was held nor was there provided an opportunity for respondents Fahringer and Cambria to be heard as they requested regarding their previous admission *pro hac vice* nor a request for admission *pro hac vice* before petitioner Morrissey. Petitioner Morrissey made no finding that respondents Fahringer and Cambria were unfit or that there were justifiable reasons for excluding or removing them as counsel of record.

On or about April 15, 1977 respondents filed a complaint in mandamus with a motion for an alternative writ of mandamus in the Ohio Supreme Court against, *inter alia*, petitioners Morrissey and the Court. Respondents requested a judgment directing petitioners to recognize respondents Fahringer's and Cambria's admission *pro hac vice* in the Ohio Court of Common Pleas. In addition, on or about April 27, 1977 respondents Flynt

and Hustler Magazine, Inc. filed an affidavit of bias and prejudice against petitioner Morrissey, which affidavit was transferred to the Supreme Court of Ohio. The Court sustained the affidavit of bias and prejudice and directed the case to be reassigned to another judge — petitioner Kraft — for all further proceedings. On May 10, 1977 petitioner Kraft advised respondents that he had reviewed all pertinent papers and that the dismissal of the mandamus action by the Ohio Supreme Court bound him by *stare decisis* to exclude respondents Fahringer and Cambria as counsel of record and precluded them from being admitted as counsel *pro hac vice*. There was never any hearing as to the fitness of respondents Fahringer and Cambria to be admitted *pro hac vice*.

On June 14, 1977 respondents filed a complaint in the United States District Court for the Southern District of Ohio. Respondents brought a declaratory judgment suit pursuant to 42 U.S.C. § 1983 and sought a judgment granting a preliminary and permanent injunction compelling petitioners to recognize and honor the *pro hac vice* admission of respondents Fahringer and Cambria and otherwise admitting them for the purpose of representing respondents Flynt and Hustler Magazine, Inc. in the absence of a finding after hearing that respondents were unfit based upon substantial reasons which would justify their exclusion.

On July 6, 1977 the Honorable Carl B. Rubin ordered that an injunction issue against the judges of the Court of Common Pleas of Hamilton County, Ohio restraining the prosecution of the state criminal charge *only* until respondents Fahringer and Cambria are granted an appropriate hearing on the right to represent respondents Flynt and Hustler Magazine, Inc. (133).* Petitioners appealed the order to the United States Court of Appeals for the Sixth Circuit. In its opinion dated April 12,

*Refers to pages of the Appendix filed in the United States Court of Appeals for the Sixth Circuit.

1978, the Court of Appeals held that: "The lawyers' rights of procedural due process were abridged and that the federal injunctive remedy does not transgress the principles of *Younger v. Harris* because the lawyers do not have an adequate state remedy in the pending state court proceeding" (2a of petition).

REASONS FOR DENYING THE WRIT

I

The removal of respondents Fahringer and Cambria from *pro hac vice* admission in the Court of Common Pleas, Hamilton County, Ohio, without a hearing was a denial of procedural due process, as properly found by the federal district court and affirmed by the Court of Appeals.

As amply detailed in the statement of facts, respondents Fahringer and Cambria, the chosen counsel of respondent Flynt, were admitted *pro hac vice* in the Ohio Court of Common Pleas. All procedures for designation as counsel of record were met by respondents according to established state law and local practice. Orders indicating that respondents Fahringer and Cambria were retained as counsel were entered in the clerk's office of the Court of Common Pleas in Cincinnati, Ohio. The district court concluded that respondents Fahringer and Cambria were admitted in accordance with the identical procedures by which they were previously admitted, with no difficulty, in a prior criminal case in the very same court before the very same judge.

Petitioners wholly misconstrue the issue before the Court. The question has never been a federal court's "forcing" an Ohio criminal court to allow a nonresident attorney to appear *pro hac vice*. Rather, the primary issue is now and has always been *whether or not out-of-state counsel who have been admitted pro hac vice in accordance with state law and local practice can have*

that status revoked in the absence of the procedural safeguards embodied in the due process clause of the fourteenth amendment. All of the facts necessary to amply substantiate the judgment of the district court, as affirmed by the Court of Appeals, were stipulated to by petitioners: respondents Fahringer and Cambria were admitted in the normal and customary fashion; they were removed summarily; and there is no remedy whatsoever for them in state court to redress the abridgement of their rights.

Although admission and removal of foreign counsel are matters within the sound discretion of the trial court, it has been uniformly held that the right of a court to exclude foreign counsel is not absolute. *Ross v. Reda*, 510 F.2d 1172 (6th Cir. 1975); *In re Evans*, 524 F.2d 1004 (5th Cir. 1975). The exercise of sound discretion by a court can only follow a due process hearing after notice and an opportunity for counsel to defend himself and his professional reputation. *See In re Evans, supra*, at 1008; *Cooper v. Hutchinson*, 184 F.2d 119 (3d Cir. 1950).

In each of the aforementioned cases where counsel were either excluded or admitted, all such determinations occurred only after the required hearing and a statement of appropriate reasons. Indeed, the Court of Appeals decision in *Cooper v. Hutchinson, supra*, was based primarily upon the absence of a due process hearing. In its distinguished decision, written by Circuit Judge Merritt, the Sixth Circuit discussed the "long legal tradition support[ing] . . . appearance by the American lawyer licensed in a sister state and the English barrister admitted under the auspices of a different court or Inn" (8a of petition). The Sixth Circuit cited numerous cases of well known attorneys, specialists in their fields, who appeared in noteworthy cases to defend out-of-state clients in unpopular causes.

As the district court aptly noted, there are "grave implications inherent in any arbitrary exclusion of counsel from

representation of a party — [a]side from . . . loss of income . . ." (128). Petitioners maintain an irrational preoccupation with out-of-state counsel's derivation of income from defending suits in sister states. Neither the federal district court nor the Court of Appeals viewed this as any sort of determinative criterion. Furthermore, it is beyond cavil that an attorney summarily removed without cause or an opportunity to be heard must "suffer an irreparable blow to his professional standing and his future employment prospects" (128,176).

Respondents Fahringer and Cambria had a recognized interest at stake. Once a status is recognized in accordance with state law, a deprivation of that interest results in injury — be it injury to reputation, economic security, future employment, professional standing or whatever — requiring procedural safeguards. *Paul v. Davis*, 424 U.S. 693 (1976).

It is sufficient to note that respondents' "interest" in the practice of law is not dependent upon the label of either privilege or right (6a of petition). Even if the right-privilege doctrine enjoyed current vitality, the practice of law is not merely a privilege or matter of grace, but is in fact a right for those legally qualified. *Baird v. State Bar Association of Arizona*, 401 U.S. 110 (1971); *Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957); *Ex parte Garland*, 71 U.S. 333 (1867).

The petitioners continue to maintain that respondents were never admitted *pro hac vice* by the Court of Common Pleas and therefore procedural due process is not required. Not only is this staement at war with the record and the allegations set forth in the complaint, it is legally without merit. Even if it be assumed, *arguendo*, that counsel were not in fact admitted *pro hac vice* prior to the transfer to petitioner Morrissey, procedural due process is still required before such special admission may be denied. As the Court of Appeals noted in its opinion:

"[W]e cannot define with *certainty* the status of the lawyers at the moment they were dismissed. The state court had approved their counsel of record forms at arraignment and had allowed the lawyers to participate in the initial steps of the state court proceedings. They had an agreement with their clients, and once the court authorized them to act, their obligations to their clients and their reasonable expectations of professional service were strengthened, whatever may have been the nature of their interests when they originally sought admission. Their interests had developed to a point where the court's action in removing them not only deprived them of their expectation of service and remuneration but also adversely reflected upon their competence and integrity. Due process standards may perhaps differ depending on the stage of the proceedings, but here, the lawyers' interest had clearly advanced to a stage where, as a matter of due process, they could not be denied the right to appear without a meaningful hearing, the application of a reasonably clear legal standard and the statement of a rational basis for exclusion" (emphasis supplied; 9a, 10a of petition).

Since it was conceded that respondents Fahringer and Cambria are neither unfit nor unqualified (18-21), summary denial of admission *pro hac vice* violates the Constitution and amounts to an abuse of discretion as a matter of law. *McGowan v. Maryland*, 366 U.S. 420 (1961); *In re Evans, supra; Ross v. Reda, supra. See also Brown v. Supreme Court of Virginia*, 359 F.Supp. 549 (E.D. Va.), *aff'd*, 414 U.S. 1034 (1973), where the court stated that exercise of discretion to admit out-of-state counsel cannot be arbitrary, unreasonable or discriminatory (359 F.Supp. at 522). For all these reasons, the petition for certiorari must be denied.

II

The district court, as affirmed by the Court of Appeals, properly enjoined the state criminal prosecution until such time as respondents Fahringer and Cambria are granted a hearing on their disqualification from *pro hac vice* status because the abstention doctrine of *Younger v. Harris* is in no way applicable to the situation at bar.

As the United States Court of Appeals for the Sixth Circuit so succinctly held, it was proper for the district court to enjoin, for a temporary period, the state criminal prosecution of respondents Flynt and Hustler Magazine, Inc. until such time as a hearing is granted to determine the propriety of the disqualification of respondents Fahringer and Cambria. Both the district court and the United States Court of Appeals recognized that the federal injunctive remedy granted in the instant case did not "transgress" the principles of *Younger v. Harris*, 401 U.S. 37 (1971), because respondents Fahringer and Cambria have no adequate remedy in the Ohio Court of Common Pleas.

Respondents Fahringer's and Cambria's rights of procedural due process were abridged by the Ohio State Court in that a substantial property right or status — the right to represent a client without unjustifiable interference — was taken without an opportunity to be heard. The district court enjoined the prosecution "until [respondents Fahringer and Cambria] are granted an appropriate hearing on their right to represent the defendants in the [state] criminal matter" (133). In bringing suit in district court, respondents were not asking to foreclose completely the prosecution in the state court.*

*The Court of Appeals noted that although the effect of the injunction has been to halt the state criminal proceeding, this interruption will only be temporary until such time as the hearing is granted (15a of petition).

In this regard, the Sixth Circuit specifically stated that:

> "While the relief sought by the plaintiffs necessarily entails a delay in the state court criminal prosecution, the grant of relief will not permanently prevent the prosecution. Following the hearing, the state prosecution may go forward on the merits. The grant of relief by the federal court will not prevent the state from interpreting and enforcing its own criminal laws" (14a of petition).

In contrast, in *Younger v. Harris, supra*, the plaintiffs in the federal suit sought to totally prevent *forever* the state criminal prosecution.

Most recently, in *Gerstein v. Pugh*, 420 U.S. 103 (1975), the Supreme Court upheld the district court's grant of injunctive relief despite the existence of ongoing state prosecutions, stating that:

> "The District Court correctly held that respondents' claim for relief was not barred by the equitable restrictions on federal intervention and state prosecutions [citing *Younger*]. *The injunction was not directed at the state prosecution as such*, but only at the legality of pre-trial detention without a judicial hearing, *an issue that could not be raised in defense of the criminal prosecution*" (emphasis supplied; 420 U.S. at 109 n.9).

Petitioners cite *Hicks v. Miranda*, 422 U.S. 332 (1975), for the proposition that only those who are defendants in state criminal actions may seek federal intervention.* The Supreme Court there noted that the considerations of comity underlying *Younger* apply "particularly where the party to the federal case may fully litigate his claim before the state court." The same considerations apply where the interference is sought by those *not* parties to the state case (422 U.S. at 349). Not only is there

*Yet the "fact that Flynt and Hustler Magazine may have an adequate state court remedy cannot protect the separate employment interests of the lawyers" (14a of petition).

no adequate state remedy but "the lawyers have in fact exhausted their state trial and appellate remedies prior to filing this case" (13a of petition). The Sixth Circuit noted that "the considerations of comity in the present case are much less significant than in *Younger* and in other cases where the doctrine has been invoked" (14a of petition).

At this point we must address petitioners' erroneous contention that the decision of the federal district court, as affirmed by the Court of Appeals, is in conflict with another so-called abstention case decided by a different circuit court. Petitioners' citation of *Bedrosian v. Mintz*, 518 F.2d 396 (2d Cir. 1975), is wholly distinguishable. There no attorney was being denied admission *pro hac vice* and therefore the hearing requirement was not the issue. In fact, the court saw no justification for excluding the out-of-state attorneys — it was just denying them payment from public funds. This decision was upheld on appeal because, unlike here, a rational basis for the exercise of the court's discretion was found to exist and abuse of discretion was not apparent (518 F.2d at 402).

Moreover, petitioners' view of a conflict is incredibly broad. In the first place the Sixth Circuit did not permanently enjoin an ongoing state criminal proceeding to protect out-of-state counsel. The Court only temporarily halted the commencement of the Ohio trial until retained counsel were given a hearing as to their fitness or unfitness to represent respondents Flynt and Hustler Magazine, Inc. Second, the issue in the instant case revolved around the abridgement of a crucial interest — *pro hac vice* admission or revocation — in the absence of a hearing. No such issue was at stake in *Bedrosian*. There, no crucial right or status *ever* attached since the court made it clear before the occurence of any proceedings that out-of-state attorneys would not be compensated from state funds (518 F.2d at 398). Thus, there was no interest placed in jeopardy in *Bedrosian* in defiance of the due process clause.

For the reasons enumerated in the district court decision of Judge Rubin and in the opinion of the United States Court of Appeals for the Sixth Circuit, respondents Fahringer and Cambria may not be precluded from obtaining injunctive relief. *Younger v. Harris* does not apply where federal intervention will not result in a determination of the merits of the state action. Therefore, there is no question of merit for this Court to decide, the issue having been conclusively settled below. We respectfully request that the petition be denied.

CONCLUSION

For all these reasons, the Court should deny this petition for certiorari.

June, 1978

Respectfully submitted,

Herald Price Fahringer, Esq.
Paul J. Cambria, Jr., Esq.
Attorneys for Respondents
Barbara J. Davies, Esq.
On the Brief
One Niagara Square
Buffalo, New York 14202
(716) 849-1333

Lipsitz, Green, Fahringer,
Roll, Schuller & James
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